ne Court, U.S.
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No. 04 356

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In The
Supreme Court of the United States

OSCAR W. EGERVARY,
Petitioner,

v.

VIRGINIA YOUNG, JAMES SCHULER, FREDERICK P. ROONEY, JAMES J. BURKE, JEFFREY C. NALLIN, AND JOHN DOES ONE-TEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit properly extended absolute immunity from damages liability to federal officers and persons acting under color of federal law who presented or assisted in the presentation of a warrant to a district court and then executed or assisted in the execution of the warrant and who knew or should have known that execution of the warrant would result in a violation of a citizen's Fifth Amendment right to procedural due process of law, where such immunity is not firmly rooted in the common law and where absolute immunity is inconsistent with the purposes of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics.*

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, which is reported as *Egervary v. Young*, 366 F.3d 238 (3d Cir. Apr. 30, 2004), is reprinted in the Appendix to this petition ("Pet. App.") at A1. The Third Circuit's opinion reversed an order and opinion of the United States District Court for the Eastern District of Pennsylvania, which had denied summary judgment to respondents Young and Schuler. The District Court's opinion is reported as *Egervary v. Young*, 159 F. Supp. 2d 132 (E.D. Pa. 2001) and along with related orders is reprinted at Pet. App. B1, C1 and D1. The Third Circuit's opinion also reversed the District Court's order and opinion denying summary judgment to respondents Rooney and Burke. The District Court's opinion is unreported and is reprinted at Pet. App. F1. In addition, the Third Circuit's opinion affirmed, on other grounds, the District Court's order and opinion granting summary judgment to respondent Nallin. The District Court's opinion is unreported and is reprinted at Pet. App. E1. The Third Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. (*See* Pet. App. G1).

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered judgment on April 30, 2004 (*see id.* at A26) and denied rehearing and rehearing *en banc* on June 15, 2004 (*see id.* at G1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Warrant in Lieu of Writ of Habeas Corpus and Its Execution.

The petitioner in this case is Oscar Egervary, a native of Hungary who emigrated to the United States in 1980 and became a United States citizen in 1987. He became romantically involved with Aniko Kovacs, a Hungarian national who came to the U.S. to study music in 1990. They were married in 1991 and established their marital residence in New Jersey. Their son, Oscar, was born on July 4, 1992. (*See* Pet. App. D4).

In February 1993, Ms. Kovacs, a concert violinist, traveled to Hungary with Oscar ostensibly to perform in a concert to be held in Budapest in March. However, despite announced intentions to return to the U.S. with Oscar in

April, Ms. Kovacs declined to return with Oscar and in fact secreted Oscar in a location unknown to petitioner. When petitioner consulted the American Embassy in Budapest, he was told that if he could find Oscar he was free to take the child back to the U.S. as they were both U.S. citizens. In December 1993, petitioner found Oscar in Budapest, took Oscar from Kovacs and returned with him to Monroe County, Pennsylvania. (*See id.* at A4, D6, F3-4).

On May 13, 1994, U.S. marshals arrived at petitioner's home with a warrant in lieu of habeas corpus signed by the Honorable William J. Nealon of the United States District Court for the Middle District of Pennsylvania, a copy of which is reprinted at Pet. App. H1-3. Pursuant to the warrant, Oscar was removed from petitioner's custody and delivered to respondent Frederick P. Rooney, Esq., who then took Oscar directly to the airport, flew him to Europe and returned him to Ms. Kovacs. Petitioner had been given no notice or opportunity to be heard prior to service of the *ex parte* warrant upon him. (*See id.* at A3, D6).

Sometime before Oscar's removal from the United States, Ms. Kovacs had sought and obtained the State Department's help in retrieving her son who, she claimed, had been kidnapped from Hungary by his father. Respondent Virginia Young of the Bureau of Consular Affairs, had contacted Mr. Rooney and asked him to represent Kovacs in filing a petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. § 11601, *et seq.* Mr. Rooney prepared the petition and warrant with the assistance of his associate, respondent James Burke, Esq., Ms. Young and another employee of the State Department, respondent James Schuler. (*See* Pet. App. A5, D11-13, 51, 80-83).

Ms. Young supplied Mr. Rooney with model pleadings containing three separate options for effecting the return of the child, all of which suggested an initial *ex parte* proceeding without notice to the alleged parent-kidnapper, followed by seizure of the child and a prompt post-deprivation hearing with notice while the child remained in the jurisdiction. In the petition filed with the District Court, however, Mr. Rooney added a fourth option that eliminated the post-deprivation hearing. Specifically, the fourth option directed "any peace officer within the Commonwealth of Pennsylvania" to "take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." (*See id.* at A5, D88-90, H3).

On May 13, 1994, Messrs. Rooney, Burke and their local counsel, respondent Jeffrey Nallin, Esq., filed the petition with the District Court. Mr. Rooney met with Judge Nealon in chambers and convinced the judge to enter the fourth option, despite the judge's expressed misgivings. The judge, however, had been reassured that this relief was available after asking Mr. Rooney to check with the State Department, and Mr. Rooney reported that he had just spoken with Mr. Schuler and had been told that the judge had authority to order the relief requested. (*See id.* at A6-7, D15-17).

Once the warrant had been signed by the judge, Messrs. Rooney and Burke sought out the U.S. marshals to assist them in executing it. The attorneys waited in a car parked on a public road outside of petitioner's residence while the federal marshals retrieved the child. The marshals brought the child to Messrs. Rooney and Burke, who immediately drove the child to Newark International Airport. The State Department assisted Messrs. Rooney and Burke in arranging to fly Oscar out of the country without a passport, whereupon Mr. Rooney removed the child from the United States. (*See* Pet. App. A8, D24-25, 96-100).

B. The District Court Proceedings.

Petitioner sued Messrs. Rooney, Burke and Nallin as well as the State Department officials Young, Schuler and John Does One-Ten under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*), alleging the violation of his most fundamental due process right to notice and an opportunity to be heard directly under the Fifth Amendment, as well as under the common law claim of civil conspiracy. The principal *Bivens* claim was that, pursuant to *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), the attorney respondents Rooney and Burke acted as federal agents when they, with the assistance of federal marshals, executed the unconstitutional warrant they had obtained from the court; that they could not have done so without the assistance of respondent Nallin; and that the attorney respondents and State Department respondents all acted under color of federal law in violating petitioner's fundamental right to due process of law by executing an order that they knew or should have known was unconstitutional. (*See* Pet. App. D1-105, E1-16, F1-37). Jurisdiction was founded upon 28 U.S.C. § 1331.

The convoluted procedural history of this case in the District Court is set forth at length in the lower court's opinion at Pet. App. A8-12. For purposes of this petition, the essential occurrences are the respondents' motions to dismiss and for summary judgment as well as the District Court's *sua sponte* motion for partial summary judgment against the attorney respondents with respect to liability. In their summary judgment motions, the attorney respondents asserted that there was no violation of petitioner's rights and that, even if a violation had occurred, his claim failed on grounds of waiver, collateral attack, lack of damages and immunity. In response to the District Court's *sua sponte* motion, they further asserted that they were not acting as

federal agents and that the defense of good faith precluded summary judgment. The State Department respondents filed a motion to dismiss and a motion for summary judgment asserting, *inter alia*, qualified immunity and a lack of personal involvement in the actions giving rise to petitioner's claim.

The District Court held that petitioner's Fifth Amendment right to due process had indeed been violated and that attorney respondents Rooney and Burke acted under color of federal law when they executed the warrant. The District Court therefore denied their summary judgment motion but granted the motion of respondent Nallin because he did not participate in the execution of the unconstitutional warrant. The District Court further declined to enter partial summary judgment on behalf of petitioner, concluding that the attorney respondents could assert a good faith defense for determination by the trier of fact. The District Court also denied the motions to dismiss and for summary judgment filed by the State Department respondents. The District Court then certified these and two other orders for immediate appeal pursuant to 28 U.S.C. § 1292(b), and the State Department respondents filed an appeal as of right with respect to the issue of qualified immunity. On April 5, 2002, the Third Circuit granted the petitions filed by all parties and consolidated the appeals for decision on the merits.

C. The Decision by the Court of Appeals.

With respect to the orders determining respondents' summary judgment motions, the Third Circuit reversed as to all but Mr. Nallin, affirmed the entry of summary judgement in his favor on alternative grounds, and ordered the District Court to enter summary judgment in favor of all respondents and against petitioner. (*See* Pet. App. A27). On the constitutional issue, the court of appeals agreed that due

process required notice and an opportunity to be heard, and that therefore the *ex parte* warrant was unconstitutional in that it provided petitioner with neither a pre- nor post-deprivation hearing before expatriating petitioner's child. (*See id.* at A3). However, then, without benefit of consideration or analysis of the issue by the trial court, and despite petitioner having based liability upon respondents' conduct *following* approval of the warrant, the Third Circuit determined that Judge Nealon's legally erroneous "independent" decision constituted an intervening superseding cause of petitioner's constitutional injury, thereby cutting off any causation of petitioner's injury stemming from respondents' *pre-approval* conduct in misrepresenting the applicable law to the judge. (*See id.* at A4, 23). The Third Circuit's causation analysis is in direct conflict with this Court's pronouncement in *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (instructing that the judicial approval of a legally defective warrant does not "break[] the causal chain between the application for the warrant and the improvident arrest" in that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)), and the Court's recent confirmation of the *Malley* directive in *Groh v. Ramirez*, __ U.S. __, 124 S. Ct. 1284, 1292, n.4, 1293 (Feb. 24, 2004) (rejecting ATF agent's assertion that the judge's approval of a facially defective warrant was the cause of the ensuing unconstitutional search on the ground that even if the judge knew at signing that the warrant was defective, it would have been unreasonable for the agent to rely on a warrant "so patently defective which was prepared by the agent himself") (citation omitted).

With respect to respondents' conduct *following* approval of the warrant, the court of appeals blithely dismissed any possibility of liability arising from such conduct by stating: "[B]ecause the judge's execution of the

ex parte Order superceded any prior tortious conduct by defendants *and shrouded any subsequent actions with a cloak of legitimacy*, we find no basis for imposing *Bivens* liability on any of the defendants." (Pet. App. A24) (emphasis added). With these words, and without the benefit of having undertaken any historical analysis whatsoever, the court of appeals has decided that where an attorney (or, more commonly, a police officer) can convince a judge to approve a warrant in contravention of a citizen's constitutional rights, then, so long as post-approval conduct does not violate the terms of the warrant, the actions undertaken to carry out the warrant are entitled to absolute immunity.

The Third Circuit thereafter denied a timely petition for rehearing and rehearing *en banc* (*see id.* at G1-2), and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition seeks to right an egregious disregard of fundamental Supreme Court precedent which left uncorrected will seriously erode the protection provided by basic constitutional guarantees. The Third Circuit's *sua sponte* decision frees government actors from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of citizens. On the way to this intolerable decision, the Third Circuit ignored the well-established principle that the immunity to be accorded government actors must be recognized at common law and must be harmonious with the history and purpose of *Bivens* and 42 U.S.C. § 1983. This freewheeling expansion of absolute immunity should be summarily reversed.

The Third Circuit's decision reduces the constitutional commands to mere words lacking any teeth. An extension of absolute immunity to government actors who execute unconstitutional warrants and court orders

that were prepared and submitted for approval by the executing actors invites irresponsible and malicious lawyering and police work. The removal of the damages liability deterrent will have far-reaching implications that will undoubtably leave citizens of the Third Circuit more susceptible to the type of irremediable harm suffered by the petitioner. Left unchecked, there will be an escalation of illegal searches and seizures and unlawful deprivations of life, liberty and property similar to the removal of a child from a parent's custody and the removal of a U.S. citizen from his or her country without due process of law. Government actors cannot be pedestaled above the law, at least not before demonstrating that the function performed has historically-rooted absolute immunity and that such protection is harmonious with the purpose of *Bivens* and Section 1983.

THE THIRD CIRCUIT DISREGARDED FUNDAMENTAL PRECEDENT IN EXTENDING ABSOLUTE IMMUNITY TO GOVERNMENT ACTORS WHO OBTAIN AND EXECUTE UNCONSTITUTIONAL WARRANTS.

This Court has embodied in *Bivens* elementary principles of accountability for federal actors who violate a citizen's constitutional rights - no official is above the law, and no violation of certain fundamental constitutional rights, among which are the deprivation of life, liberty or property without due process of law, should be without a remedy. *Bivens'* rationale is that without an effective sanction for the unlawful behavior of government actors, the constitutional guarantees are nothing more than rhetoric.

Bivens and its state actor counterpart, Section 1983, created "a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417

(1976).[1] The Court has accorded the defense of absolute immunity to a circumscribed group of government officials "whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It is well-settled that legislators, in their legislative functions, and judges, in their judicial functions, are insulated with absolute immunity. *See id.* (citing cases). In addition, absolute immunity has been extended to certain officials of the Executive Branch, including prosecutors, executive officers engaged in adjudicative functions, and the President of the United States. *See id.* (citing cases).

This Court's jurisprudence mandates that before absolute immunity from damages liability for unconstitutional behavior will be extended to government actors, the asserted privilege must withstand a two-part inquiry. *See Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992); *Malley*, 475 U.S. at 339-40. The initial inquiry is whether the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt*, 504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)). If an official was indeed accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the second inquiry is whether the history and purpose of *Bivens* and Section 1983 counsel against recognizing the same immunity in these actions. *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). *See also Richardson v. McKnight*, 521 U.S. 399, 404 (1997). The Court has steadfastly been "quite sparing" in recognizing absolute immunity for government officials, and has "refused to

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[1] This case does not involve any issue concerning immunity accorded to state actors sued under Section 1983. However, as the Court stated in *Butz v. Economou*, 438 U.S. 478 (1978), it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 438 U.S. at 504.

extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991) (quoting *Harlow, supra*, at 811). In short, where a tradition of absolute immunity did not exist as of 1871, the Court has refused to grant immunity in the context of *Bivens* and Section 1983. *See Burns*, 500 U.S. at 498 (Scalia, J., concurring in judgment in part and dissenting in part).

In extending absolute immunity to government actors who execute unconstitutional warrants prepared and submitted by the actors for approval, the Third Circuit disregarded the fundamental principles articulated in this Court's jurisprudence. En route to creating this privilege, the Third Circuit did not point to any common law counterpart and failed to reconcile how the rule is consistent with the history and purpose of *Bivens* and Section 1983. Nor did the Third Circuit show that respondents performed a function protected with historically-rooted absolute immunity. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433-36 (1993) (refusing to expand absolute immunity to court reporters because there was no common law tradition of absolute immunity for court reporters or the function reporters perform).

Instead, the Third Circuit rests its entire decision concerning respondents' unconstitutional post-approval conduct on a single enigmatic sentence: "Thus, because the judge's execution of the *ex parte* Order superseded any prior tortious conduct by defendants *and shrouded any subsequent actions with a cloak of legitimacy*, we find no basis for imposing *Bivens* liability on any of the defendants." (Pet. App. at A24) (emphasis added). In the absence of a detailed examination as to whether the absolute immunity it extended to government actors who execute unconstitutional warrants was recognized in 1871, the

privilege enacted by the Third Circuit must be suspect.[2] Moreover, it belies justice, public policy, and logic to deem that an unconstitutional act, which the government actor knew or should have known was unconstitutional, is "shrouded . . . with a cloak of legitimacy" by a court's erroneous decision. Indeed, such an extension of immunity is precisely the "freewheeling policy choice[]" Justices White and Kennedy cautioned is contrary to an immunity doctrine "rooted in historical analogy." *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) (quoting *Malley*, 45 U.S. at 342 (White, J.)).

Had the Third Circuit applied well-established precedent it would have found that common law did not recognize a privilege analogous to the rule it created. The common law torts most closely analogous to the respondents' conduct are malicious prosecution and abuse of process. As determined in *Wyatt*, at common law these torts accorded causes of action for unjustified harm arising from the misuse of governmental processes against private parties. *Wyatt*, 504 U.S. at 164. The Court decided in *Wyatt* that although common law provided public prosecutors and judges absolute immunity, complaining witnesses, who, like the respondents in this case, "set the wheels of government in motion by instigating a legal action" are not entitled to immunity from liability. *Id.* at 164-165 (citing *Malley*, 475 U.S. at 340-41).

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[2] On its face, the Third Circuit's unsupported and ill-considered decision expands absolute immunity to all government actors who execute warrants or court orders that they obtain and know or should know are unconstitutional. A notional interpretation that the Third Circuit only extended immunity to actors who represent a private party in removing a child from a parent's custody and from the United States is likewise incongruous with basic Supreme Court jurisprudence for the same reasons that the literal expansion flies in the face of this Court's precedent.

Had the Third Circuit applied well-established precedent it would have further found that extending absolute immunity to government actors who obtain and execute unconstitutional warrants or court orders is inconsistent with the history and purpose of *Bivens* and Section 1983. The purpose of *Bivens* and Section 1983 is to deter government actors from using the "badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161 (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *accord Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

In *Malley*, the Court refused to extend absolute immunity to a police officer who presented a state district court judge with a complaint and supporting affidavit that failed to establish probable cause. The Court explained that it interprets Section 1983 to give absolute immunity to "functions intimately associated with the *judicial* phase of the criminal process, not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because a lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342 (quotation and citation omitted) (emphasis in original). It is indisputable that neither government nor the American judicial process will grind to a halt if government actors who obtain and knowingly execute unconstitutional warrants are held accountable for the resulting violations of citizens' constitutional rights.

The Third Circuit's expansion of absolute immunity to respondents is manifestly incongruous with the purpose of *Bivens* and Section 1983. In direct contrast with the purpose of *Bivens* and Section 1983, the Third Circuit's decision undermines the damages liability deterrent applicable to government actors who obtain and execute warrants authorizing constitutional deprivations. Anointed

with this unrestricted badge, government actors who can convince a judge to approve an unconstitutional warrant in the Third Circuit will be free from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of citizens. This expansion of immunity to these government actors will undoubtably incite abuse of authority as well as irresponsible lawyering and police work and will inevitably lead to an escalation of irremediable constitutional deprivations.

Petitioner and the citizens of the states, cities and localities comprising the Third Circuit are entitled to protection from invasion of their personal interests in life, liberty, and property against government actors and have a right to accountability when deterrence fails. Because of the importance of the preservation and vindication of constitutional guarantees, the Court should either summarily reverse the Third Circuit's decision or grant *certiorari* to examine this unexplained expansion of absolute immunity.

CONCLUSION

Petitioner respectfully requests that the decision of the Third Circuit be summarily reversed in this case. In the alternative, the petition for writ of *certiorari* should be granted to examine this unexplained expansion of absolute immunity.

Respectfully submitted,

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